Kong Ming Trading Sdn Bhd v MTS Construction & Trading Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(W)-07–01 OF 2015
ZAWAWI SALLEH, VERNON ONG AND ABDUL RAHMAN SEBLI JJCA
11 OCTOBER 2016

Contract — Damages — Sale of goods — Respondents filed claim for special damages against appellant for defective goods sold by appellant — Appellant counterclaimed for price of goods which respondents rejected but did not return and did not pay for — Whether SIRIM certificate relied upon by appellant should be given weight — Whether SIRIM certificate admissible — Whether trial court should give weight to evidence of self-proclaimed expert — Whether learned trial judge correct in apportioning 50–50 liability on both parties' claims

Evidence — Weight of evidence — Decisions of trial judge — Respondents filed claim for special damages against appellant for defective goods sold by appellant — Appellant counterclaimed for price of goods which respondents rejected but did not return and did not pay for — Whether SIRIM certificate relied upon by appellant should be given weight — Whether SIRIM certificate admissible — Whether trial court should give weight to evidence of self-proclaimed expert — Evidence Act 1950 s 45

The respondents bought modular blocks of the brand name 'Wallstones' from the appellant for them to use in the construction of a retaining wall. Nevertheless, when the modular blocks were used in the construction, the retaining wall collapsed and it was found that the modular blocks were defective. The finding by the respondents' expert (SP2) was that the Wallstones could only withstand a compressive strength of 18.31N/mm2, below the second respondent's required strength of 19.2N/mm2. Consequently, the respondents sued the appellant for special damages in the sum of RM343,023.84. In response, the appellant counterclaimed against the respondents for the sum of RM43,545.60 being the price of Wallstones that it had delivered which the respondents rejected but did not return and did not pay for; and RM25,628.80 for losses due to the cancellation of orders for the Wallstones. The High Court allowed 50% of the respondents' claim for special damages and 50% of the appellant's counterclaim for the price of the Wallstones that the respondents rejected but failed to return and pay for, hence these appeal and cross-appeal by both parties. Both parties contended that it was the other side that must bear 100% of the blame for the collapse of the

retaining wall and not 50–50 as apportioned by the learned trial judge. In this regards, the appellant submitted that the collapse of the wall had nothing to do with the quality of the Wallstones but due to the wet soil condition, design failure and method of construction adopted by the second respondent. The appellant relied on the certificate purportedly issued by SIRIM which contained a test result showing that the Wallstones had a comprehensive strength of 25.56N/mm2 exceeding the strength required by the second respondent. On the other hand, the respondents submitted that the learned trial judge should not have given any weight to the SIRIM certificate as no SIRIM officer was called to prove the contents of the documents. The respondents further submitted that the learned trial judge was wrong in giving undue weight to the testimony of SD3, a self-proclaimed expert on the construction of retaining walls called by the appellant.

Held, dismissing the appellant's appeal and allowing the respondents' cross-appeal:

(1) The appellant did not produce any evidence to prove that the test purportedly carried out by SIRIM was in fact carried out on the particular Wallstones that were delivered to the second respondent's project site. Although the respondents raised no objection when the SIRIM certificate was produced as evidence, no weight should be given to the test result as no evidence was led as to how the maker of the report came to the conclusion that the Wallstones had a compressive strength of 26.56N/mm2. The contents of the SIRIM certificate was therefore inadmissible, being hearsay and ought not to have been considered at all by the learned trial judge (see paras 26–28).

(2) SD3 was a contractor and not an expert within the meaning of s 45 of the Evidence Act 1950 and there was no evidence that he had sufficient experience on the subject to qualify as an expert witness. In the circumstances, the learned trial judge should not have given such weight to the testimony of SD3, which was speculative at best (see para 35).

(3) There was no challenge at all to the evidence of the relevant respondents' witnesses who testified that the losses suffered by the respondents were a direct result of the defective Wallstones. Vouchers, receipts and documents showing the cost and expenses incurred by the respondents had been tendered as evidence by the respondents. The law is settled that such failure to challenge would amount to acceptance of the evidence. Thus, the appellant was entirely to blame for the collapse of the retaining wall and that the losses incurred by the respondents were the natural and probable result of the defective Wallstones. The learned trial judge was therefore wrong in allowing only 50% of the first respondent's claim for special damages (see paras 38–40).

(4) The learned trial judge was wrong in finding the respondents were 50% liable for the loss suffered by the appellant. It was the appellant itself who refused to remove the Wallstones from the construction site despite being asked to do so three times by the respondents. The respondents were therefore justified in disposing of the Wallstones instead of returning them to the appellant at their expense (see paras 41–43).

[Bahasa Malaysia summary

Responden membeli batu modular berjenama 'Wallstones' daripada perayu untuk mereka gunakan dalam pembinaan dinding penahan. Namun, apabila batu modular itu digunakan dalam pembinaan, dinding penahan telah runtuh dan adalah didapati bahawa batu modular adalah cacat. Dapatan oleh pakar pihak responden (SP2) adalah bahawa Wallstones hanya boleh menahan kekuatan mampatan sebanyak 18.31N/mm2, di bawah keperluan kekuatan responden kedua sebanyak 19.2N/mm2. Akibatnya, responden menyaman perayu untuk ganti rugi istimewa berjumlah RM343,023.84. Sebagai balasan, perayu menuntut balas terhadap responden untuk jumlah RM43,545.60 yang menjadi harga Wallstones yang telah dihantar yang mana telah ditolak tetapi tidak dikembalikan dan tidak dibayar oleh responden; dan RM25,628,80 untuk kerugian disebabkan oleh pembatalan pesanan untuk Wallstones. Hakim Mahkamah Tinggi membenarkan 50% daripada tuntutan responden untuk ganti rugi istimewa dan 50% tuntutan balas perayu untuk harga Wallstones yang ditolak oleh responden tetapi gagal untuk dikembalikan dan dibayar, maka rayuan ini dan rayuan balas oleh kedua pihak. Kedua pihak menegaskan bahawa pihak lagi satu yang perlu menanggung 100% kesalahan untuk keruntuhan dinding penahan dan bukannya 50–50 sepertimana yang dibahagikan oleh hakim perbicaraan bijaksana. Berkaitan dengan ini, perayu mengemukakan bahawa keruntukan dinding tidak mempunyai kaitan dengan kualiti Wallstones tetapi disebabkan keadaan tanah basah, kegagalan reka bentuk dan kaedah pembinaan yang digunakan oleh responden kedua. Perayu bergantung dengan sijil yang kononnya dikeluarkan oleh SIRIM yang mana mengandungi hasil ujian menunjukkan bahawa Wallstones mempunyai kekuatan komprehensif sebanyak 25.56N/mm2 melebihi kekuatan yang dikehendaki oleh perayu kedua. Sebaliknya, responden mengemukakan bahawa hakim perbicaraan bijaksana tidak sepatutnya memberikan apa-apa berat kepada sijil SIRIM kerana tiada pegawai SIRIM telah dipanggil untuk membuktikan kandungan dokumen. Responden seterusnya mengemukakan bahawa hakim perbicaraan bijaksana terkhilaf dalam memberi berat tidak wajar kepada testimoni SD3, seorang pakar yang diisytiharkan sendiri terhadap pembinaan dinding penahan yang dipanggil oleh perayu.

Diputuskan, menolak rayuan perayu dan membenarkan rayuan balas responden:

(1) Perayu tidak mengemukakan apa-apa keterangan untuk membuktikan

bahawa ujian yang kononnya dijalankan oleh SIRIM adalah sebenarnya dijalankan untuk Wallstones tertentu yang telah dihantar ke tapak projek responden kedua. Walaupun responden tidak membangkitkan apa-apa bantahan apabila sijil SIRIM telah dikemukakan sebagai keterangan, tiada berat sepatutnya diberikan kepada hasil ujian memandangkan tiada keterangan yang menunjukkan bagaimana pembuat laporan membuat kesimpulan bahawa Wallstones mempunyai kekuatan mampatan sebanyak 26.56N/mm2. Kandungan sijil SIRIM oleh itu tidak boleh diterima, kerana dengar cakap dan seharusnya tidak dipertimbangkan langsung oleh hakim perbicaraan bijaksana (lihat perenggan 26–28).

(2) SD3 adalah kontraktor dan bukan seorang pakar yang terangkum dalam makna s 45 Akta Keterangan 1950 dan tiada keterangan bahawa dia mempunyai pengalaman yang mencukupi terhadap perkara itu untuk melayakkannya sebagai saksi pakar. Dalam situasi itu, hakim perbicaraan bijaksana tidak sepatutnya memberikan berat sebegitu terhadap testimoni SD3, yang pada tahap terbaik hanyalah spekulasi (lihat perenggan 35).

(3) Tiada cabaran langsung terhadap keterangan saksi relevan responden yang memberi keterangan bahawa kerugian dialami oleh responden adalah akibat langsung Wallstones yang cacat. Baucar, resit dan dokumen menunjukkan kos dan perbelanjaan yang ditanggung oleh responden telah dikemukakan sebagai keterangan oleh responden. Undang-undang telah menetapkan bahawa kegagalan untuk mencabar sebegitu akan dikira sebagai penerimaan keterangan. Maka, perayu adalah dipersalahkan sepenuhnya untuk keruntuhan dinding penahan dan bahawa kerugian ditanggung oleh responden adalah semula jadi dan hasil berkemungkinan daripada Wallstones yang cacat. Hakim perbicaraan bijaksana adalah oleh itu terkhilaf dengan membenarkan hanya 50% tuntutan responden pertama untuk ganti rugi istimewa (lihat perenggan 38–40).

(4) Hakim perbicaraan bijaksana terkilaf dalam membuat dapatan responden adalah 50% bertanggungan terhadap kerugian yang dialami oleh perayu. Adalah perayu sendiri yang enggan memindahkan Wallstones daripada tapak pembinaan walaupun telah diminta untuk berbuat demikian sebanyak tiga kali oleh responden. Responden oleh itu adalah dibenarkan untuk membuang Wallstones bukannya mengembalikan mereka kepada perayu atas perbelanjaan mereka (lihat perenggan 41–43).]

Notes

For a case on decisions of trial judge, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 3335.

For cases on sale of goods, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 4799–4800.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and Another Appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)
Caltex Oil Malaysia Ltd v Classic Best Sdn Bhd & Ors [2007] 4 MLJ 772, HC (refd)
Chinbiomedic Engineering Sdn Bhd v Klinik Puwan & Surgery [2010] MLJU 461; [2010] 7 CLJ 506, HC (refd)
Fujikura Federal Cables Sdn Bhd v Luen Wah Electric Co (M) Sdn Bhd [2009] MLJU 447; [2009] 1 LNS 492, HC (distd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)
Wee Lian Construction Sdn Bhd v Ingersoll-Jati Malaysia Sdn Bhd [2010] 3 MLJ 425; [2010] 4 CLJ 203, CA (distd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Evidence Act 1950 s 45
Sale of Goods Act 1957 s 43

Appeal from: Writ of Summons No S-22–606 of 2010 (High Court, Kuala Lumpur)

Logendran (Norfazilah with him) (Fazilah & Logen) for the plaintiff.
HC Yap (KS Lau and SF Wong with him) (Yap Loke & Loh) for the respondents.

Abdul Rahman Sebli JCA:

[1] We made the following orders at the conclusion this appeal and cross-appeal:

(a) dismissing the appellant's appeal;

(b) setting aside the High Court decision allowing 50% of the appellant's counterclaim in the sum of RM25,628.80;

(c) allowing the first respondent's cross-appeal and ordering the appellant to pay the full sum claimed by the first respondent for special damages, ie RM343,023.84 with interest at the rate of 8%pa from the date of summons to the date of full payment;

(d) damages to be assessed; and

(e) the appellant to pay costs of RM10,000 to the respondents.

[2] We now provide the grounds for our decision. The background facts are as follows. In the High Court, the respondents sued the appellant for special damages in the sum of RM343,023.84 for the sale and purchase of goods which were later discovered to be defective. The goods were modular blocks of the brand name 'Wallstones' which the first respondent supplied to the second respondent for the latter's use in the construction of a retaining wall for its client at Saujana Impian, Kajang.

[3] The appellant counterclaimed against the respondents for the sum of RM43,545.60, being the price of Wallstones that it had delivered to the second respondent which the first and second respondents rejected but did not return and did not pay for, and RM25,628.80 for losses due to the cancellation of orders for the Wallstones or alternatively for set off in the same sum against the respondents' claim. Thus, the total sum that the appellant counterclaimed against the respondents was RM69,174.40.

[4] What happened prior to the purchase of the Wallstones was that the appellant had represented to the respondents that the Wallstones could withstand a compressive strength of 20.7N/mm2 which would meet the second respondent's requirement in the construction of the retaining wall. Acting on the representation, the first respondent decided to purchase the Wallstones which the second respondent later used as overarching materials for the construction of the wall.

[5] However, even before the Wallstones were put to use, problems had already begun to surface. When the Wallstones were unloaded from the appellant's lorry at the second respondent's project site, some of them were found to be in broken pieces. Complaints were made to the appellant, who then replaced them with new ones but by then the retaining wall had to be dismantled and re-built, this time under the supervision of the appellant's own supervisor.

[6] The new Wallstones did not solve the construction problem. In fact the problem persisted. During re-construction of the wall on 11 November 2009, cracks began to appear again. This caused the consultant engineer for the second respondent to halt usage of the Wallstones. The uncompleted retaining wall had to be dismantled for the second time.

[7] The respondents then decided to source elsewhere for an alternative brand of construction material known as 'Keystones' which cost the respondents more. By using the keystones, construction of the retaining wall

proceeded smoothly and the wall was finally completed on 24 November 2009 free from any defect.

[8] At the conclusion of the trial, the learned trial judge found for the first respondent but ruled that it was only entitled to 50% of the special damages claimed, hence the award of RM171,512 instead of the full sum of RM343,023.84. The second respondent's claim was dismissed.

[9] As for the appellant's counterclaim, the learned judge ordered the first respondent to pay the appellant a sum of RM21,773 for its failure to return the rejected Wallstones that had been delivered to the second respondent. This amount represented 50% only of the sum claimed by the appellant, ie RM43,545.60. The appellant's counterclaim for losses due to the cancellation of orders for the Wallstones was however disallowed.

[10] So 50% was the order of the day. To clear any confusion as to who was appealing against what, perhaps we should set out in clearer terms the respective appeals by the parties.

[11] The appellant's appeal was against those parts of the High Court decision that decided as follows:

(a) in finding it 50% liable for the collapse of the retaining wall;

(b) in allowing only 50% of its counterclaim for the price of the Wallstones that the respondents rejected but failed to return and pay for, ie a sum of RM21,773 only instead of the claimed sum of RM43,545.60; and

(c) in ordering the parties to bear their own costs.

[12] The respondents' cross-appeal, on the other hand, was for the following orders:

(a) a variation of the High Court decision allowing only 50% of their claim of RM343,0123.84 for special damages;

(b) that the High Court decision to disallow assessment of general damages be set aside; and

(c) that the decision of the High Court ordering the parties to pay their own costs be set aside.

[13] On the main issue of liability, the contention by both parties was that it was the other side who must bear 100% of the blame for the collapse of the retaining wall and not 50-50 as apportioned by the learned trial judge. The appellant's contention was that it was not liable to pay even a single cent to the respondents whilst the respondents' argument was that they were entitled to

every single sen of the sum claimed, ie RM343,023.84 and not just RM171,512 as ordered by the learned trial judge.

[14] As for the appellant's appeal against the decision by the High Court to allow 50% only of its RM43,545.60 counterclaim for the cost of the Wallstones already delivered to the second respondent but which remained unpaid, it was a recycle of the same argument except that the parties exchanged hats. Now it was the respondents' turn to argue that they were not liable to pay even a single sen for the non-return of the Wallstones whilst the appellant's argument was that it was entitled to every single sen of the sum claimed, ie RM43,545.60 and not just RM21,773 as ordered by the learned trial judge. So it was the winner takes all and the loser forgets all position that the parties had adopted.

[15] In finding that the appellant was 50% liable for the collapse of the retaining wall, the learned judge's reasoning was that the losses suffered by the respondents was due in part to the defect in the Wallstones which were found to contain foreign objects such as plastic, glass, etc that were embedded in the Wallstones and the appellant could not provide any reasonable explanation for their presence. This was how the learned judge dealt with the issue:

> Pada masa yang sama mahkamah juga mengambil perhatian keterangan plaintif yang menunjukkan bahawa wallstone yang dihantar ada yang pecah dan ada yang mengandungi benda asing seperti serpihan kaca, plastik dan sebagainya di dalamnya. Walaupun dihujahkan bagi pihak defendan bahawa plaintif tidak mengemukakan bukti dengan pastinya bahawa wallstone tersebut adalah wallstone dari defendan, semasa memberi keterangan SD5 tidak menafikan bahawa wallstone yang dikemukakan di Mahkamah yang mengandungi benda asing itu adalah hasil keluarannya.
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> ... defendan tidak dapat menerangkan dengan keyakinan mengapa terdapat benda asing dalam wallstone yang dikatakan telah disediakan mengikut piawaian yang ditetapkan oleh SIRIM.

[16] The appellant's contention was that the collapse of the wall had nothing to do with the quality of the Wallstones but due, as found by the learned trial judge, to the wet soil condition, design failure and method of construction adopted by the second respondent who had no experience in using Wallstones as material in constructing a retaining wall. In particular, it was pointed out that the Wallstones had in fact met the specifications required by the second respondent and as such its liability should be 0% instead of 50%.

[17] The appellant relied on the certificate purportedly issued by SIRIM to deny any liability. The SIRIM certificate contained a test result showing that the Wallstones had a compressive strength of 26.56N/mm2, exceeding the strength of 19.2N/mm2 required by the second respondent for the

A construction of the retaining wall. Learned counsel for the appellant urged upon us to take judicial notice of the authenticity of the certificate, particularly in view of the fact that it was admitted in evidence without any objection by the respondents.

B **[18]** At the outset of his submissions in this appeal and cross-appeal, learned counsel for the appellant took the position that the appellant's appeal would rest or fall on this certificate. This was the appellant's gambit and the cornerstone of its appeal. It was submitted that since it was the learned judge's own finding that the Wallstones conformed to SIRIM standard as reflected in
C the SIRIM certificate, it was wrong for her to apportion any liability, let alone 50% to the appellant for the collapse of the retaining wall.

[19] The submission was premised on the ground that the certificate issued
D by SIRIM provided conclusive proof that the appellant's Wallstones were not defective, contrary to what the respondents alleged. This, according to the appellant, supported its claim that the collapse of the retaining wall had nothing to do with the quality of the Wallstones but due to the respondents' own fault.

E **[20]** The respondents' answer to the contention was that in the first place the learned trial judge should not have given any weight to the SIRIM certificate as no SIRIM officer was called to prove the contents of the document. It was argued that the SIRIM certificate by itself did not provide proof that the
F Wallstones were not defective. It was thus contended that the learned trial judge was wrong in relying on the SIRIM certificate to deduct, so to speak, 50% of the RM343,023.84 that the first respondent claimed for special damages.

G **[21]** For either side to succeed in this appeal and cross-appeal on the issue of liability, the burden was on both to convince the court that the learned trial judge was plainly wrong in finding that they were equally (50–50) to blame for the failure of the retaining wall.

H **[22]** The law on appellate interference is well settled and has been reemphasised time and again by our courts, among which is the pronouncement by this court in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 (CA). The decision has since been affirmed by the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin*
I *@ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309.

[23] The question in each case is whether the decision by the lower court is so fundamentally flawed that it had given rise to prejudice or injustice to the party affected by the decision. That of course is another way of saying that the

decision had occasioned a miscarriage of justice.

[24] We had considered the matter carefully in our deliberation. The view that we took was that even assuming for a moment that the learned judge was right in finding that the appellant's Wallstones conformed to SIRIM standard, the appellant could not be exonerated of liability altogether because on the proved facts, it is clear that the Wallstones contained foreign objects such as glass, plastic, et cetera which should not be there and which the appellant could not explain.

[25] In fact, the appellant's own witness ('SD5') agreed that the appellant deserved a 'scolding' for the presence of these foreign objects. SD5 further admitted that the foreign objects would affect the structural integrity or strength of the material in the construction of the retaining wall. Thus, the question of the appellant being not liable at all (0% liability) for the failure of the retaining wall does not arise at all.

[26] We were inclined to agree with the respondents that the learned trial judge was wrong in relying on the SIRIM certificate to determine quantum of liability. It is true that the report showed a compressive strength of 26.56N/mm2, which exceeded the strength required by the second respondent for the construction of the retaining wall, but the fatal missing link in the appellant's case was that it produced no evidence to prove that the test purportedly carried out by SIRIM was in fact carried out on the particular Wallstones that were delivered to the second respondent's project site.

[27] Here again the appellant's own witness (SD5) candidly admitted that he would not know the circumstances under which the test was carried out by SIRIM, nor the person who carried out the test, nor even the maker of the test report. Thus, although the respondents raised no objection when the SIRIM certificate was produced as evidence, no weight should be given to the test result as no evidence was led as to how the maker of the report came to the conclusion that the Wallstones had a compressive strength of 26.56N/mm2.

[28] The contents of the SIRIM certificate was therefore inadmissible, being hearsay and ought not to have been considered at all by the learned trial judge. The law is clear that inadmissible evidence remains inadmissible irrespective of whether any objection was raised to its admission. We do not find it necessary to cite any authority for this trite proposition of law.

[29] Learned counsel for the respondents referred to us an article by Loganathan Krishnan titled *An Insight into the Law of Product Safety* reported in [2006] 5 MLJ xxx where the learned author had this to say on the role played by SIRIM:

Safety Labels

SIRIM, which was formed in 1975, is the national body that tests and endorses the safety of products and comes under the Ministry of Finance. It also develops the appropriate standards of safety and is becoming an effective standards and testing organization. Nonetheless, it could be said that it is geared more towards the interests of manufacturers. This is because, to test whether a product is safe, it is sent by manufacturers voluntarily for a fee for SIRIM standard marks under what is known as the Certification Marketing Scheme. Once the mark is given, the product is certified as safe. On the other hand, even if testing has been done, SIRIM does not collect data in relation to risks, defects or hazards present in the product. There is also no provision empowering SIRIM to develop mandatory standards for all manufacturers and importers to comply with or to test products before they go for sale, in the interests of consumers.

Voluntary action on the part of manufacturers to determine a product's safety is ineffective. The justification given by SIRIM is that it is not a fully governmental body and therefore its scope is restricted. It should also be noted that SIRIM only determines the safety of a finished product that has not yet been circulated in the market. Once the product is certified and then circulated, SIRIM does not have any power to test the safety of the products in the market. Its involvement is only at the inception stage.

[30] In our view, the error by the learned trial judge in relying on the SIRIM certificate to apportion liability was serious enough to warrant intervention by this court as it was the test result as contained in the certificate that weighed heavily in the learned judge's mind when she concluded that the appellant was only 50% to blame for the collapse of the retaining wall.

[31] If the SIRIM report were to be disregarded, as it should, the appellant would be left with no evidence to support its claim that the Wallstones were not defective, thus destroying the whole substratum of its appeal. The only expert report before the court would be the report by Ideal Engineering Labarotary Sdn Bhd produced by the respondents, which favoured them. The finding by the respondents' expert ('SP2') was that the Wallstones could only withstand a compressive strength of 18.31N/mm2, below the second respondent's required strength of 19.2N/mm2.

[32] With regard to the appellant's complaint that the respondents refused to conduct a joint testing of the Wallstones alleged to be defective, the respondents' answer was that at the time the appellant wrote the letter suggesting for a joint testing, the retaining wall had already been re-constructed for the third time using keystones and was duly completed without any problem. We were in agreement with the respondents on this issue.

[33] In any case, we found merit in the respondents' argument that if indeed the collapse of the retaining wall had nothing to do with the use of the defective

Wallstones but due to design failure and method of construction amongst others as alleged by the appellant, the use of the keystones would in all probability have also led to a collapse of the wall, but it did not happen.

[34] It was further argued by learned counsel for the respondents that the learned trial judge was wrong in giving undue weight to the testimony of SD3, a self-proclaimed expert on the construction of retaining walls called by the appellant. Again we were in agreement with the respondents. SD3 visited the construction site for only one hour on 16 October 2009 and for that very short visit, he was called to testify that the respondents had not applied the correct method of installation and had used unsuitable materials.

[35] The evidence further showed that SD3 visited the project site without appraising himself of the issues between the parties and had no communication with the consultant engineer for the respondents. More importantly, SD3 was a contractor and not an expert within the meaning of s 45 of the Evidence Act 1950 and there was no evidence that he had sufficient experience on the subject to qualify as an expert witness. In the circumstances, we did not think it was right for the learned trial judge to have given such weight to the testimony of SD3, which was speculative at best.

[36] Learned counsel for the appellant pointed out that the respondents did not reject the Wallstones outright and in fact continued to use them for the construction of the retaining wall. This according to the appellant shows that it was not the Wallstones that was the root cause of the wall failure.

[37] We did not find this to be a convincing reason either for exonerating the appellant of liability for the collapse of the retaining wall. We accepted as more plausible the respondents' explanation that the reason why they continued to use the Wallstones despite the defect was because the appellant had assured them that the cracks could be due to a wrong method of installation or due to some other factors. In addition to that, the appellant had also assured the respondents that replacement Wallstones would be supplied and its experienced supervisor would be assigned to supervise the second construction.

[38] Of no less significance in the whole scheme of things is the fact that there was no challenge at all to the evidence of the relevant respondents' witnesses who testified that the losses suffered by the respondents were a direct result of the defective Wallstones. Vouchers, receipts and documents showing the cost and expenses incurred by the respondents had been tendered as evidence by the respondents. The law is settled that such failure to challenge would amount to acceptance of the evidence: *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and Another Appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639; *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212.

[39] On the proved facts and having regard to the probabilities of the case, it was clear to us that the appellant was entirely to blame for the collapse of the retaining wall and that the losses incurred by the respondents were the natural and probable result of the defective Wallstones.

[40] The learned trial judge was therefore wrong in allowing only 50% of the first respondent's claim for special damages. In the circumstances the first respondent's cross-appeal ought to be allowed, and for general damages to be assessed.

[41] As for the appellant's appeal in respect of the RM21,773 awarded to it for its counterclaim, which accounted for only 50% of its claim of RM43,545.60, we were of the view that the appellant's appeal had no merit. It is clear to us that the learned trial judge was again wrong in finding the respondents to be equally to blame (50% liable) for the loss suffered by the appellant as a result of the respondents' failure to return the rejected Wallstones and not paying for them.

[42] The truth is, it was the appellant itself who refused to remove the Wallstones from the construction site despite being asked to do so three times by the respondents vide letters dated 13 November 2009, 28 November 2009 and 4 December 2009. After the Wallstones were removed by the respondents to their warehouse, again the respondents vide letter dated 10 December 2009 wrote to the appellant to remove the defective Wallstones from the warehouse but received no response.

[43] The respondents were therefore justified in disposing of the Wallstones instead of returning them to the appellant at their expense. In this regard s 43 of the Sale of Goods Act 1957 is relevant. It provides as follows:

> 43 Buyer not bound to return rejected goods
>
> Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

[44] As for case law on the point, the following dictum by Vernon Ong Lam Kiat J (as His Lordship then was) in *Chinbiomedic Engineering Sdn Bhd v Klinik Puwan & Surgery* [2010] MLJU 461; [2010] 7 CLJ 506 is directly on point:

> In the circumstances, ought the defendant to have returned the rejected Fresenius Machines to the plaintiff? In law it is sufficient if the defendant has intimated to the plaintiff that he refuses to accept the Fresenius Machines (s 43 of the SOGA). The defendant is under no obligation to return the Fresenius Machines to the plaintiff. On the evidence it is clear that DW1 communicated the rejection verbally to Chelyan who was present. It then fell upon the plaintiff to take back the rejected

Fresenius Machines but they did not do so.

[45] The authorities cited by the appellant in support, namely *Caltex Oil Malaysia Ltd v Classic Best Sdn Bhd & Ors* [2007] 4 MLJ 772; *Wee Lian Construction Sdn Bhd v Ingersoll-Jati Malaysia Sdn Bhd* [2010] 3 MLJ 425; [2010] 4 CLJ 203; and *Fujikura Federal Cables Sdn Bhd v Luen Wah Electric Co (M) Sdn Bhd* [2009] MLJU 447; [2009] 1 LNS 492 do not assist the appellant as they deal with different issues of law apart from the fact that the factual matrix of those cases are totally different from the facts and circumstances of the present case.

[46] If the appellant was relying on those authorities to say that the respondents should have inspected the goods before accepting them, instead of making noise later, the fallacy of the argument lies in the fact that in the present case it was only later and through expert examination that the respondent discovered that the Wallstones contained foreign objects and unfit for use in the construction of the retaining wall.

[47] It was for all the reasons aforesaid that we decided to dismiss the appeal by the appellant and allowed the respondents' cross-appeal.

Appellant's appeal dismissed; respondents' cross-appeal allowed.

Reported by Dzulqarnain Ab Fatar